Nor can it be argued that states possess residual power (for example, pursuant to the power over intrastate rates preserved to them under section 2(b) of the Act[330]) over agreements to provide network elements outside of section 251-252. As the Supreme Court has observed, the 1996 Act "unquestionably" took "the regulation of local telecommunications competition away from the States."[331] Because these agreements are not for network elements required by section 251, they fall outside the specific grant of state jurisdiction in section 252, and thus are subject solely to federal jurisdiction.

Under federal jurisdiction, the terms of such agreements are subject to sections 201 and 202 of the Act. As such, these agreements must be just, reasonable, and not unreasonably discriminatory.[332] The Commission already has held, and the D.C. Circuit affirmed, that this is correct with respect to the *pricing and combination* of elements provided outside the scope of section 251.[333] There is no basis to argue that a different result would obtain for their terms.

Similarly, because such agreements are governed solely by federal law, the requirements regarding their filing with regulators are defined solely by section 211(a) of the Act. That section requires the filing of contracts with the Commission. There simply is no basis to argue that agreements for elements provided outside the scope of section 251 must be filed with state commissions.

Indeed, the language of section 211(a) affirmatively authorizes carriers to order their affairs with other carriers by way of contract unless the FCC's rules (or other provisions of the

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330 47 U.S.C. § 152(b).

331 *Iowa Utilities*, 525 U.S. at 378 n.6.

332 47 U.S.C. §§ 201-202.

333 *TRO*, 18 F.C.C.R. at 17384-89, paras. 653-664 ("Where there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network element."), *aff'd USTA II*, 359 F.3d at 576. *See also supra* Section VI.

Act) provide otherwise, even when the same business relationship with an end-user customer would need to be dealt with in a tariff.[334] Section 211(a) stands for the legal proposition that ILECs may enter into commercial negotiations with CLECs for the sale of network elements not subject to Sections 251(b) or (c), and may enter into binding agreements with those CLECs for the sale of those network elements (even though untariffed sales to end-user customers may not be lawful). As noted above, the general prohibition against "unreasonable discrimination" applies to such contracts.[335] Carriers may, of course, purchase services from the tariffs of another carrier or choose to tariff their inter-carrier offerings — section 211(a) provides carriers a choice in those instances where the FCC has not acted affirmatively to require either a contract (e.g., for network elements required by section 251) or a tariff (e.g., for exchange access).[336]

The contracts at issue here fall squarely within this comprehensive federal regulatory regime. Although the Commission has exempted by rule non-dominant carriers from the federal filing obligations applicable under section 211(a),[337] no such exemption exists for contracts between ILECs and CLECs, since ILECs remain subject to dominant carrier regulation. Furthermore, although the Commission has required ILECs to provide access services via tariff, the Commission has not directed the ILECs to provide these network elements as tariffed offerings.

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334 *Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250, 1277 (3d Cir. 1974). *See also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking,* 11 F.C.C.R. 7141, 7190 (1996); *In the Matter of the Applications of American Mobile Satellite Corporation, Order and Authorization,* 7 F.C.C.R. 942, 945 (1992); *In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations, Further Notice of Proposed Rulemaking,* 84 FCC 2d 445, 481 (1981).

335 *MCI Telecommunications Corporation v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

336 In fact, the current structure whereby interexchange carriers purchase access to local exchange carrier facilities and services pursuant to tariff is of relatively recent origin. *See MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rulemaking,* 77 FCC 2d 224, 226-31 (1980). The access tariff regime replaced a system governed largely by inter-carrier contracts and partnerships. *See MTS and WATS Market Structure, Third Report and Order,* 93 FCC 2d 241, 246, 254, 256-58 (1983).

337 *See Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements, Report and Order,* 1 F.C.C.R. 933 (1986).

Under section 211(a), then, contracts for elements not subject to the section 251-252 structure must be filed with the Commission pursuant to section 211(a).

Moreover, the existence of this comprehensive federal regulatory regime demonstrates conclusively that a state filing requirement would conflict with the federal regulatory structure, and could not stand.

Although it is clear that in any case involving network elements not required to be unbundled under section 251 — whether or not required under the section 271 competitive checklist — sole jurisdiction is vested in the Commission, this proceeding (and the related proceedings that the Commission has incorporated by reference) is rife with examples of carriers' and states' attempts to require the state filing (in some cases, for approval) of such contracts.[338] It is therefore necessary for the Commission definitively to clarify that agreements for the provision of network elements not required under section 251 are subject solely to federal jurisdiction. Their rates and terms are subject only to sections 201 and 202, and their filing — with the Commission — is governed only by section 211(a).

VII. BOCS' OBLIGATIONS TO UNBUNDLE ELEMENTS UNDER THE SECTION 271 COMPETITIVE CHECKLIST ARE STRICTLY LIMITED

As noted above, BOCs may have an "independent obligation," pursuant to section 271, to unbundle certain network elements enumerated in the section 271 competitive checklist even if these elements need not be unbundled pursuant to section 251. Because the full panoply of section 251-252 requirements does not apply to these elements, they are subject to substantially

338 *See, e.g.*, SBC Communications Inc., Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations, WC Docket No. 04-172 (filed May 3, 2004); BellSouth Telecommunications, Inc., Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245 (filed July 1, 2004).

lesser regulatory obligations. This section discusses the obligations BOCs face under section 271 related to (1) combining of elements and (2) requirements to provide fiber-to-the-home ("FTTH") loops.

A. There Is No Need for the Commission to Impose a Rule Requiring BOCs to Combine Elements Made Available Pursuant to Section 271

In the *USTA II* decision, the D.C. Circuit upheld the Commission's conclusion that BOCs are not obligated to combine elements provided pursuant to section 271 with other elements unbundled under section 271 or 251.[339] The Court agreed with the Commission that neither the combination requirement nor the non-discrimination requirement in section 251(c)(3) applies to elements unbundled per checklist items 4-6 or 10.[340]

Irrespective of whether the non-discrimination requirement of section 202 requires BOCs to combine section 271 elements, there is no basis for the Commission to impose upon Qwest a combination requirement pursuant to section 202 that parallels the section 251(c)(3) combination requirement. As noted above, Qwest offers a UNE platform service (its QPP product) by contract tariff within its region that provides competitors with access to combined UNEs at a reasonable, market-based price.[341] The Commission previously has held, and courts have affirmed, that where market forces provide adequate protection against unreasonable discrimination, there is no need for invasive anti-discrimination requirements.[342] Qwest's QPP offering is a response to a competitive marketplace. As demonstrated in the preceding sections of these comments, self-

339 *USTA II*, 359 F.3d at 576. *See also TRO*, 18 F.C.C.R. at 17386, n. 1990.

340 *USTA II*, 359 F.3d at 576.

341 *See supra* Section III.A.4.

342 *See, e.g., Orloff v. Vodafone AirTouch Licenses, LLC et al., Memorandum Opinion and Order,* 17 F.C.C.R. 8987 (2002), *aff'd sub nom. Orloff v. FCC,* 352 F.3d 415 (D.C. Cir. 2003) (finding that discrimination was not unreasonable under section 202(a) given the protections of a competitive marketplace). *Cf. Kiefer v. Paging Network, Inc. d/b/a PageNet,* Memorandum Opinion & Order, 16 F.C.C.R. 19129 (2001) (finding that a late fee in a competitive marketplace was not unreasonable under section 201(b)).

provisioning and third-party facilities or services exist as viable alternatives for each part of Qwest's network. As a result, in order to avoid losing all revenues from the network facilities serving the customers of other carriers, Qwest formulated the QPP offering. Thus, the QPP offering demonstrates that the market for section 271 elements is sufficiently competitive that combination rules are unnecessary. This is reaffirmed by the fact that section 271 elements do not meet the section 251 impairment test — usually, because of the existence of competitive alternatives.

In addition, it would be inappropriate to apply the same combination rules to section 271 elements that apply to section 251(c)(3) elements because of the differences in the non-discrimination provisions in the two sections. The non-discrimination requirement in section 202 is less stringent than the non-discrimination requirement in section 251(c)(3). While section 251(c)(3) imposes an *unqualified* requirement to provide UNEs on an nondiscriminatory basis, section 202 requires that carriers not engage in *unreasonable* discrimination.[343] As noted above, the Commission has found that not all discrimination is unreasonable — particularly in competitive markets. Thus, the different non-discrimination standards in sections 271 and 251(c)(3) further illustrate that it would be improper for the Commission to impose equivalent combination requirements under the two sections.

Competitive alternatives exist for the elements that must be unbundled pursuant to section 271 but not section 251. In response to this competitive condition, Qwest has made the QPP offering available, demonstrating that comprehensive combination rules for section 271 elements are unnecessary in the Qwest region.

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343 *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket 96-149, 11 F.C.C.R. 21905, 21998 (1996) (holding that section 272(c)(1) establishes a "more stringent" and "unqualified" standard than section 202, given the difference in language).

B. Section 271 Does Not Require the Unbundling of Broadband Fiber Loops

The Commission correctly concluded in the *Triennial Review Order* that FTTH loops should not be subject to unbundling pursuant to section 251 because the impairment requirement was not met,[344] and the Court upheld this finding.[345] Neither FTTH nor other broadband fiber loops (such as fiber to multiple dwelling units, fiber to the curb, or other fiber-based broadband facilities) also are not subject to unbundling pursuant to section 271.

Nothing in section 271 requires the unbundling of fiber loops. Item 4 on the competitive checklist requires BOCs to unbundled "local loop transmission,"[346] but ILECs can satisfy this obligation by unbundling narrowband loops where they exist. The Commission has long recognized that broadband loops are a distinct product in a different market from narrowband facilities.[347] There is no reason to believe that Congress contemplated broadband fiber loops when it wrote item 4 into the competitive checklist. Broadband fiber loops are new facilities that all carriers are equally well situated to deploy.[348]

Finally, all of the policy reasons that support the Commission's decision not to require unbundling of broadband fiber loops pursuant to section 251 also support the conclusion that broadband fiber loops should not be unbundled pursuant to section 271. Excluding broadband fiber loops from unbundling obligations encourages all carriers to invest in broadband facilities

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344 *TRO*, 18 F.C.C.R. 17142-43, para. 274.

345 *USTA II*, 359 F.3d at 572-73.

346 47 U.S.C. § 271(c)(2)(B)(iv).

347 *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, 16 F.C.C.R. 6547, 6574-75, para. 69 (2001).

348 As discussed above, it is irrelevant that ILECs or BOCs may be better positioned to deploy capital-intensive facilities such as broadband fiber loops simply because they are larger companies than many competitors. *See supra* Section I.C.

and encourages facilities-based competition, furthering The Act's goals as expressed in section 706.[349]

Even if the Commission concludes, however, that section 271 requires the unbundling of broadband fiber loops, the Commission should forbear from the requirement. Petitions for forbearance already are pending, amply demonstrating that the forbearance standard is met.[350] For all the reasons that CLECs are not impaired without access to broadband fiber loops, unbundling is not necessary to ensure just, reasonable, and nondiscriminatory pricing or to protect consumers. And the strong public interest in competitive broadband deployment clearly will be served by declining to order the unbundling of broadband fiber loops.

VIII. THE COMMISSION SHOULD REAFFIRM ITS DECISIONS TO ELIMINATE CERTAIN UNBUNDLING REQUIREMENTS IN THE *TRIENNIAL REVIEW ORDER*

Any decision by the Commission to reverse its prior holdings is subject to the requirement that the Commission provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[351] A "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making."[352] Developments postdating the issuance of the *TRO* only underscore the validity of the Commission's earlier findings regarding line sharing, enterprise switching,

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349 *See TRO, 18 F.C.C.R. at 17142-46, paras.* 273-280, *aff'd USTA II* at 572-73.

350 *See, e.g.*, Qwest Omaha Forbearance Petition; BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 04-48 (filed March 1, 2004); Letter to Chairman Michael Powell, *et al.*, FCC, dated October 24, 2003, from Susanne Guyer, Verizon, filed in CC Docket No. 01-338 *et al.*

351 *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *see also Office of Communication of the United Church of Christ v. FCC*, 590 F.2d 1062 (D.C. Cir. 1978) (to change a policy, agency must provide "reasoned basis for its action, fully explaining the course it has taken in light of relevant legal and policy issues").

352 *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003), *quoting Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971).

high capacity transport, and broadband loops. In light of the foregoing, Qwest submits that there is no basis for revisiting those prior determinations.

With respect to line sharing, in the *TRO* the Commission reversed its earlier holding and declined to require unbundling of the high frequency portion of the loop ("HFPL") pursuant to Section 251.[353] The D.C. Circuit upheld the Commission's decision, finding it "reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband."[354]

In its *Order and NPRM,* the Commission seeks comment generally on how the FCC should proceed on remand to revise its rules consistent with the court's mandate. Qwest submits that, since the *USTA II* court upheld the FCC's decision not to unbundle the HFPL — and because the Commission's prior determination was the correct one — no action regarding these facilities is necessary (or appropriate) on remand.[355] However, while the *Order and NPRM* itself does not raise line sharing, it does incorporate petitions for reconsideration filed with respect to the *TRO*, one of which challenges the FCC's ruling in this regard.[356] However, that petitioner has failed to produce any new evidence subsequent to *USTA II*'s affirmation of the FCC's decision that would provide any basis for the Commission to further consider the issue of line sharing. Consequently, the Commission should affirm its decision with respect to line sharing, and dismiss the EarthLink Petition as moot in light of *USTA II.*

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353 *TRO*, 18 F.C.C.R. at 17133-35, paras. 258-261.

354 *USTA II*, 359 F.3d at 585.

355 Indeed, as the government stated in its Brief in Opposition to the Petitions for Certiorari filed with respect to the *USTA II* decision, "[t]he court of appeals correctly upheld the FCC's decision to phase out line sharing requirements...." See, *NARUC v. USTA, et al.*, Sup. Ct. Case Nos. 4-12, 4-15 and 4-18, Brief for the Federal Respondents, filed Sept. 1, 2004, p. 17.

356 Petition for Reconsideration of Earthlink, Inc., CC Docket No. 01-338, *et al.*, filed October 2, 2003 (the "EarthLink Petition").

If, notwithstanding the foregoing, the Commission still proceeds to undertake a new impairment analysis with respect to the HFPL, *USTA II* mandates a national finding of no impairment since a critical element of the impairment test cannot be met. Specifically, the market for broadband services does not exhibit natural monopoly characteristics. In fact, ILECs are not even the dominant provider of broadband services.[357] Therefore, the HFPL is not a bottleneck monopoly facility, and any alleged barrier to entry from the lack of unbundled access to the HFPL cannot be tied to structural barriers related to a natural monopoly that make competitive entry wasteful. There is, in addition, ample evidence of competition in the broadband services market, which demonstrates that there are alternate sources of broadband facilities to serve mass market customers.[358] And, while competitors continue to be able to secure access to the HFPL by leasing the entire loop[359] or by entering into line splitting[360] arrangements, the advent of VoIP has made those types of arrangements largely unnecessary.[361] The lack of a natural monopoly,

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357 *See* Section II.C, *supra*.

358 *Id.*

359 Covad recently announced its new "dedicated-loop ADSL" whole-loop offering. (Covad Press Release, *Covad Launches Dedicated Loop ADSL for Consumers and Small Businesses Nationwide* (July 6, 2004), *available at* <http://www.covad.com/companyinfo/ pressroom/pr_2004/070604_news.shtml>.) In fact, the evidence demonstrates that more CLEC broadband customers are served through whole-loop offerings than line sharing. (Letter to Marlene H. Dortch, FCC, dated May 19, 2003, from Susanne Guyer, Verizon, filed in CC Docket Nos. 01-338, *et al.*)

360 While some CLECs have argued that there are costs and delays associated with the ILECs' OSS to implement line splitting, the Commission did not find the CLECs' OSS argument to be persuasive, and the *USTA II* court upheld the FCC's analysis. Further, contrary to the assertions of some parties, line splitting continues to be a viable option notwithstanding the elimination of UNE-P. Vast improvements in the hot cut process have been developed subsequent to the issuance of the *TRO* which address many of the concerns associated with the elimination of switching from the list of unbundled network elements. Further, even if this claim warrants a closer look in other areas of the country, it must be summarily dismissed in Qwest's region. Qwest's QPP agreement permits line splitting.

361 Since VoIP enables carriers to provide both voice and high speed data, former data-only providers no longer need to find a voice carrier to pair with on the line.

plus the existence of viable alternative sources of facilities to provide broadband services, precludes any finding of impairment with respect to the HFPL.[362]

Even if the Commission declines to render a national finding of no impairment with respect to the HFPL, it should conclude that competitors are not impaired within Qwest's region. Qwest has reached three-year commercial agreements with Covad Communications Company ("Covad"), the largest CLEC provider of DSL services, and seven additional CLECs,[363] that provides for the functional equivalent of line sharing (even though never required by any court) at commercially reasonable rates, terms and conditions.[364] CLECs who sign the agreement also can convert existing customers that are served by UNE line sharing to the commercial line sharing product, which may result in lower rates than the transitional rates adopted in the *TRO*.[365] Qwest has filed the Covad agreement with the FCC pursuant to Section 211 of the Act,[366] and has posted the agreement on its website. The agreement is available to any requesting carrier within Qwest's region. Execution of this agreement by the most prominent DSL provider in the country as well as other CLECs demonstrates that competitors have alternate access to the HFPL in Qwest's region at commercially reasonably rates, and they are therefore not impaired without unbundled access to the HFPL.

Even if the Commission concludes that competitors are impaired without access to the HFPL as a UNE, it should not require unbundling. The costs associated with unbundling that

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362 The D.C. Circuit concluded in *USTA I* that it is unreasonable to conclude that competitors are impaired when alternative facilities are significantly deployed on a competitive basis. *USTA I*, 290 F.3d at 422. The same court subsequently stated in *USTA II* that "intermodal competition in broadband, particularly from cable companies, means that even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources. *USTA II*, 359 F.3d at 580.

363 *See* Campbell Declaration, p. 5.

364 Campbell Declaration, pp. 2, 4.

365 Campbell Declaration, p. 4.

366 47 U.S.C. § 211(a).

caused the Commission to decline to mandate this draconian measure in the *TRO* continue to support that decision. TELRIC prices for the HFLP, which continue to be set close to zero,[367] continue to produce the same irrational cost advantage for CLECs that the Commission condemned in the *TRO*,[368] and which undercut the goals of encouraging the deployment of services to open up competition in all local telecommunications markets and investment in broadband infrastructure and innovation.

In addition, the advent of VoIP technology creates a new cost of requiring the HFPL to be unbundled — it produces an opportunity for regulatory arbitrage. This is evident in the context of a customer who subscribes to a CLEC for broadband and VoIP services, but also maintains his ILEC voice line as a back-up at the lowest available rate. In this circumstance, the CLEC would be able to provide both voice and data services, while only paying for the HFPL which, as the FCC acknowledges, is frequently priced close to zero. Assuming the customer uses the VoIP service to make most of his voice calls,[369] the ILEC will lose substantial revenues.[370] In stark contrast, the CLEC enjoys the advantage of this loophole by reaping extraordinary profits — it can charge the customer for a voice and data package, but need only pay the ILEC for the HFPL — *i.e.*, almost nothing. Prior to VoIP, a CLEC providing both voice and data services would have required the entire loop facility, which at least would entitle the ILEC to certain revenues. But now, the combination of VoIP and unbundled access to the HFPL would create a loophole by which CLECs could engage in regulatory arbitrage, secure access to facilities at almost no cost, and cause significant financial hardship to the ILEC. The Commission's rules must reflect the realities of the marketplace, as those realities change with techno-

367 *TRO*, 18 F.C.C.R. at 17135, para. 260.

368 *Id.*

369 Since the customer has kept his ILEC voice line only as a back-up, this assumption is reasonable.

370 This, in turn, will have an impact on universal service support mechanisms.

logical developments. The advent of VoIP requires that the Commission act to close this loop-hole. In sum, the costs of unbundling the HFPL continue to significantly outweigh the benefits. The Commission should not require unbundling.

CONCLUSION

For the foregoing reasons, the Commission should find that there is no impairment nationwide with respect to mass-market switching, high-capacity loops, and transport, on a nationwide basis. Whether or not it makes that nationwide determination, it must prohibit all conversions of existing, in-use special access circuits to UNEs (as well as prohibit the use of UNEs by carriers in locations or on routes where such carriers are using special access) as a matter of law.

Respectfully submitted,

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October 4, 2004

**REDACTED —
FOR PUBLIC INSPECTION**

ATTACHMENT 1

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

DECLARATION OF

DENNIS PAPPAS

REDACTED – FOR PUBLIC INSPECTION

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DECLARATION OF DENNIS PAPPAS

I. INTRODUCTION

1. My name is Dennis Pappas. I am employed by Qwest Corporation as a Director in the Public Policy organization representing Local Network Operations. My business address is 700 W. Mineral Avenue, Room MNH19.15, Littleton, Colorado 80120. I have worked in the telecommunications industry for 26 years. Between 1996 and 2001, I was directly associated with Interconnection and Wholesale Product Marketing. My first responsibilities in this area were as State Interconnection Manager for Colorado and Wyoming, a position that involved project management of all collocation activity. I later became a team leader for the Unbundled Loop and Collocation product teams. Subsequently, I became the Director of the Wholesale Product Marketing team and, during that time, led multiple groups in developing new products and processes for provisioning interconnection products and services for competitive local exchange carriers ("CLECs"). Subsequent to that assignment, I was the

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General Manager for Qwest Wholesale Emerging Diversified Markets and had responsibility for approximately 75 CLEC accounts. In late 2000, I left Qwest to accept a position as Vice President of Services at TESS Communications, which was a facilities-based CLEC in Colorado and Arizona that provided a suite of services, including telecommunications, data, long distance and CATV, to approximately 1,200 end users. In early 2001, I assumed the role of President of TESS with responsibility for the day-to-day operations of the company. I left TESS in that same year and returned to Qwest, where I again worked on the unbundled loop product team and began participating as a witness in a number of section 271 workshops. In December 2001, I accepted my current position as Director in Qwest's Public Policy group. Following the issuance of the *Triennial Review Order*, I led a team developing a "batch hot cut" process, which would CLECs to undertake large quantities of UNE-P to UNE-Loop conversions at a reduced price and without lengthy outages for end user customers.

2. Prior to the years worked in Wholesale Markets, I held multiple titles and positions requiring expertise in network operations, including Staff Manager and Regional Service Manager in the Local Networks Organization. In the 14 years prior to those assignments, I worked in Network as an Installation and Maintenance Technician (I&M Technician) and an Outside Plant Technician. I have my Bachelor's degree in Business Administration and a Masters in Telecommunications from the University of Denver.

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II. EXECUTIVE SUMMARY

3. This Declaration describes the new region-wide batch hot cut process ("BHCP") that Qwest developed in conjunction with the CLECs in its region, and describes how that process eliminates any concern that Qwest's unbundled loop provisioning practices might "impair" CLECs from serving the mass market without unbundled ILEC switching. This process allows CLECs to migrate large quantities of CLEC UNE-P lines to stand-alone unbundled loops within reasonable timeframes and at a high level of quality, and enables CLECs to realize cost savings and operational efficiencies that result from pre-wiring and cutting over many loops at a time in the same central office location, instead of one or two at a time. The improvements in loop provisioning yielded by this new process make it more economic for CLECs to serve mass-market customers in various markets without access to unbundled ILEC switching. This Declaration also describes the additional improvements, including substantial reductions in batch hot cut rates in most states, which Qwest agreed to implement for CLECs who sign Qwest's Qwest Platform Plus ("QPP") commercial agreement.[1] Earlier this year, the D.C. Circuit in *USTA II* vacated the batch hot cut requirements in the *Triennial Review Order*. Nevertheless, Qwest has agreed voluntarily to implement nearly all these improvements by mid-October 2004. The remainder will be implemented by mid year 2005.

[1] The first commercial agreement was negotiated with MCI was signed on July 16, 2004. Since that time, a number of other CLECs have negotiated commercial QPP agreements with Qwest. See Declaration of William M. Campbell.

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4. Following the issuance of the *Triennial Review Order*, Qwest and the CLECs in its region "agree[d] that a single, uniform batch hot cut process for all states within the Qwest region provides the most efficient and effective operating environment for both Qwest and CLECs," and that it was "appropriate for the industry participants . . . to attempt to reach agreement on a batch hot cut process" to the extent possible.[2] Accordingly, all fourteen state commissions in Qwest's region agreed to participate in a consolidated forum to develop a region-wide BHCP and to build the record for the states' individual *Triennial Review Order* dockets. There is no doubt that the Forum was worthwhile. The new BHCP outlined here reflects the hard work of Qwest and the participating CLECs over a number of months and meetings and is the product of substantial give and take among the parties. Qwest and the CLECs were able to reach agreement on the broad outlines of a new BHCP and most of the operational details, and they were able to close the vast majority of the issues and questions that the CLECs had put on the table for resolution. During the Forum sessions, a smaller number of operational issues went to impasse, along with (not surprisingly) the ultimate question of whether the proposed BHCP would sufficiently permit the withdrawal of unbundled ILEC switching.

5. The BHCP discussed in this Declaration enables CLECs to order large quantities of standalone unbundled loops, at a price that is generally below the TELRIC

[2] See Joint Motion of Qwest, AT&T and MCI regarding adoption of a multistate Batch Hot Cut Forum. No CLEC in this state objected to this motion.

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price established by state commissions for individual hot cuts,[3] and with predictable delivery intervals. CLECs (at their option) will be able to use the BCHP to convert both their existing base of UNE-P lines and batches of newly-acquired customers. The BHCP will be available as an additional provisioning option to the basic, coordinated, and project-managed hot cuts that Qwest offers today and that state commissions and this Commission reviewed in connection with Qwest's section 271 Application. CLECs desiring more coordination for the cutover of particular customers, or who wish to migrate loops with particular configurations preventing them from being batched for conversion on a consolidated and expedited basis, will continue to be able to use existing migration options.

6. The BHCP is premised on the fact that for the vast majority of hot cuts that CLECs request today and would require going forward, the conversion entails the simple reuse of facilities already being used (and thus known to be working), does not require the dispatch of a technician to the field, and requires only minimal coordination between the ILEC and the CLEC *as long as* the CLEC actually delivers working dial tone to the ILEC's frame before the conversion is to take place. In fact, the process for BHC requires that dial tone be present on the CLEC facility one day after the order was submitted to Qwest.

[3] In those states where Commissions have set the NRC for the basic installation well below the cost of providing it, the NRC price may not be lower.

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7. This is only one improvement which allows Qwest to efficiently convert loop onto the CLEC platform. Other improvements provide the following benefits to the CLEC:

- It enables multiple CLECs at a time to convert significantly larger volumes of UNE-P lines to stand-alone unbundled loops simultaneously than would have been possible without the BHCP.

- It provides CLECs with a fixed, seven business day provisioning interval for batches of 25 to 100 lines in a single central office, as compared to the SGAT's current individual-case-basis ("ICB") negotiated interval for LSRs containing 25 lines or more. To my knowledge, this provisioning interval is much shorter than any other RBOC has offered to date.

- In virtually every state, the per-line non-recurring costs of an eligible hot cut is significantly reduced from the basic hot cut rate.

- It takes advantage of the ability to streamline and consolidate conversions involving the reuse of in-service facilities, while preserving all existing hot cut options for other kinds of conversions for CLECs that prefer a greater degree of coordination.

- It dedicates teams of central office technicians (2 technicians per office) exclusively to performing these batch conversions outside normal business hours, thereby avoiding any interference with any other network provisioning activities.

- It minimizes customer disruption by scheduling lift and lays during a time when business and residential customers are least likely to be receiving calls, and by giving CLECs the option of receiving *instantaneous* notification of both when the cutover of a batch is beginning and when the cutover of a given line is complete, signaling the CLEC to port the customer's number.

- It eliminates all need for up-front coordination between Qwest and the CLEC by offering CLECs an electronic tool for scheduling their own cutover days.

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- At the CLECs' request, it provides a web-based status tool that CLECs may use to review the results of their dial-tone checks and the progress of their cutovers, thus avoiding the need for e-mails and telephone calls.

- It gives CLECs early warning (at the time of prewiring) of potential problems with their facilities and gives them two to three days to fix any problems, thus greatly streamlining work on the day of cut and reducing the number of subsequent orders.

- It gives CLECs an ample margin of error so that CLEC mistakes on a single line within the batch will not jeopardize an entire batch.

- As Hitachi Consulting has independently verified, it presents a process that works, and provides CLECs with the necessary assurances that Qwest will continue to provision unbundled analog loops using this new process at an acceptable level of quality.

- Finally, as Hitachi Consulting has also verified, the BHCP will be able to handle current and expected volumes of UNE-L orders and conversion of the embedded base of UNE-P lines over the course of the TRO's transition period, even assuming the worst case scenario that all existing UNE-P lines in affected areas would transition to UNE-L using the BHCP.

8. These improvements make Qwest's already strong loop provisioning process even stronger, and eliminates any possible concern that Qwest's ability to provision stand-alone unbundled loops would prevent an efficient CLEC from being able to serve mass-market customers economically in the absence of unbundled ILEC switching.

III. ORGANIZATION OF THE DECLARATION

9. The Declaration first discusses the batch hot cut requirements of the *Triennial Review Order*, which initially led to the joint development of the Qwest BHCP.

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Next, the Declaration summarizes Qwest's existing hot cut process and its performance in migrating loops through that process. Following this discussion, the Declaration describes the Operations Support Systems ("OSS") modifications and additional tools that Qwest agreed to develop as part of the BHCP. The remainder of this Declaration will focus on the region-wide Batch Hot Cut Forum, the details of Qwest's BHCP, an evaluation of the BHCP by Hitachi Consulting, and the additional BHCP improvements in the QPP agreement.

IV. CONVERSION REQUIREMENTS

10. Qwest's BHCP was originally designed to satisfy the batch hot cut requirements established in the *Triennial Review Order*. Even though those requirements have been vacated by *USTA II*, it is still useful to review them in order to place Qwest's BHCP in context. In the *Triennial Review Order*, the Commission determined that "in the large majority of locations" (though not all),[4] incumbent LECs' existing processes for migrating in-service loops one at a time from their own switches to their competitors' could "serve as barriers to competitive entry in the absence of unbundled switching" for mass-market customers.[5] The Commission expressed concern that some ILECs' non-recurring charges were too high, and it questioned whether these current processes would be able "to handle the necessary volume of migrations" if mass-market switching is taken off the unbundling list.[6]

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4 *TRO* ¶ 473.
5 *TRO* ¶ 460.
6 *TRO* ¶ 459.